

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.: 10/559,095
Confirmation No.: 1462
Inventor: Marianne Hofmann
Filing Date: December 1, 2005
Group Art Unit: 3765
Examiner: Alissa L. Hoey
Attorney Docket No.: 008312-000006
Title: Hood for Protective Garment

REMARKS FOR PRE-APPEAL BRIEF REVIEW

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant requests review of the final rejection in the above-identified application. These Remarks are being filed along with a Pre-Appeal Brief Request for Review (PTO/SB/33) and Notice of Appeal (as well as associated fees). No amendments are being filed with this request, and no Appeal Brief has yet been filed. As will be explained below, this request for Pre-Appeal Brief Review is based upon clear legal error and/or factual deficiencies and not based on the interpretation of claims or prior art teachings.

REMARKS

In the Final Office Action dated May 25, 2010 the Examiner rejected all of the pending claims as anticipated or obvious. Specifically, the Examiner rejected independent claims 22, 39, and 40 under 35 U.S.C. 102(b) as being anticipated by Pampuch (US 4,174,710). Applicant submits that Pampuch does not set forth each element of independent claims 22, 39, and 40 which is required for a prima facie rejection and thus the Examiner's rejection is clear error. *See Verdegaa Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987) (a "claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference").

Rejected claim 22 reads:

A hood, in particular for a clothing item for protective and military purposes, such as an NBC protective suit, said hood comprising:

a hood body having a peripheral edge defining a face opening, said face opening being constructed and arranged for receiving a respirator;

a peripheral elastic hem attached to said peripheral edge, said peripheral elastic hem being constructed and arranged to extend around said face opening, said peripheral elastic hem having an inner face and an outer face; and

a plurality of peripheral sealing elements *conjoined* to the inner face of said peripheral elastic hem, said plurality of peripheral sealing elements comprised of *elastofibers* and being constructed and arranged for closeout abutment against and around the respirator received by said face opening, wherein the individual sealing elements are in *substantially parallel arrangement* with each other, wherein the sealing elements abut the respirator linearly, and wherein the sealing elements project or protrude from the hem. (*emphasis added*)

Although additional grounds for review exist, for the sake of brevity Applicant will highlight only three examples of Examiner's clear error in the final rejection. Specifically, Pampuch does not disclose the following three elements from claim 22: peripheral sealing elements *conjoined* to the inner face of the hem; sealing elements which are in *substantially parallel arrangement* with each other; nor peripheral sealing elements comprised of *elastofibers*. Each of these examples is discussed below.

I. Pampuch does not disclose "a plurality of peripheral sealing elements conjoined to the inner face of said peripheral elastic hem."

The Examiner points to Pampuch, column 2, lines 12-15 as disclosing sealing elements conjoined to the elastic hem. Conjoined is defined as "being, coming, or brought together so as to meet, touch, overlap, or unite."¹ Two separate items or distinct ends of a single item are required in order to meet, touch, overlap, or unite. Pampuch does not teach two separate items.

Pampuch teaches an elastic band 5 having integral or unitary forms including thickened portion 5a and groove 5c (Pampuch column 1, lines 62-65) (see figure below from Pampuch). This is the extent of what Pampuch teaches - a unitary construction. The subject application discloses and claims sealing elements being "conjoined" to the elastic hem (see sealing elements 6 being conjoined to elastic band 3 in FIG. 4B below from the subject application).

¹ "conjoined." Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 19 August 2010 <<http://www.merriam-webster.com/dictionary/conjoined>>

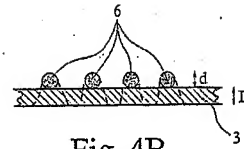
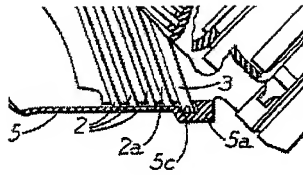


Fig. 4B

Pampuch does not disclose the limitation of sealing elements being conjoined to the elastic band because the band of Pampuch is simply a band integrally formed with thickened end 5a and groove 5c as a single-piece construction. No language exists within Pampuch to indicate that elements 5a or 5c are conjoined to the band. When sealing, the elastic band of Pampuch is stretched over the mask and attached at rib 3, providing tensile stress through the band. Conjoining of the thickened end 5a and groove 5c to the elastic band 5 of Pampuch would cause an unnecessary point of weakness and thus possible failure whereby if the conjoining seal where broken, the mask would fail. This helps to explain the rationale behind the Pampuch structure. The Examiner points only to language in Pampuch in which the inside of the elastic band in an additional form is provided with ribs (Pampuch, column 2, lines 12-16). However, because Pampuch fails to mention that the ribs are a separate part being conjoined to the elastic band 5, the Examiner fails to identify "a plurality of peripheral sealing elements conjoined to the inner face of said peripheral elastic hem." The "provided with" language, consistent with elements 5a and 5c, means "unitary".

II. Pampuch does not disclose "individual sealing elements in substantially parallel arrangement with each other."

The Examiner points to Pampuch, column 2, lines 12-16 as showing Applicant's claimed element of "individual sealing elements in substantially parallel arrangement with each other." The Examiner is simply incorrect, as nowhere in those lines is there any mention of substantially parallel sealing elements. Additionally, nowhere in the entire Pampuch reference is there any mention of parallel or substantially parallel sealing elements.

Perhaps the Examiner assumed that "laterally spaced" (Pampuch, column 2, line 15) equates to "substantially parallel arrangement" (subject application, claim 22). Applicant submits that this contention is incorrect, as sealing elements can be laterally spaced, but not substantially parallel. "Parallel" is defined as "extending in the same direction, everywhere equidistant, and not meeting."² "Laterally" is defined as "situated on, directed toward, or coming

² "parallel." Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 19 August 2010 <<http://www.merriam-webster.com/dictionary/parallel>>

from the side."³ "Laterally spaced" as used in Pampuch could describe a substantially parallel arrangement, but being substantially parallel is not a requisite feature of a laterally spaced arrangement. For an illustration, see the figure below showing an example representation of a laterally spaced arrangement which is clearly not substantially parallel, as the lines do not extend in the same direction, are not everywhere equidistant, and if extended further would eventually meet.



Nowhere in Pampuch is the term "laterally spaced" defined such as to encompass a limitation of "substantially parallel." When describing the mask provided with ribs, Pampuch describes those ribs as being "spaced a suitable distance apart" and being "laterally spaced . . . such that they form a sort of labyrinth." (Pampuch, column 1, lines 44-48). This definition does not limit "laterally spaced" to "substantially parallel." In fact, the term labyrinth, which Pampuch does not otherwise define has a dictionary definition of "an intricate structure of inter-connecting passages through which it is difficult to find one's way."⁴ This is hardly the equivalent of "substantially parallel." See again the figure above, showing an arrangement both spaced a suitable distance apart and forming a sort of labyrinth which is clearly not substantially parallel. Additionally, even rib 3 shown in the Pampuch figure appears to widen near the ear area of the mask and narrow near the top and bottom areas, thus it is not substantially parallel.

III. Pampuch does not disclose a "plurality of peripheral sealing elements comprised of elastofibers."

The Examiner asserts that Pampuch inherently discloses "sealing elements comprised of elastofibers" due to "elastic material construction" (page 3 of Examiner's Final Office Action, dated April 28, 2010). Presumably the Examiner is referring to elastic band 5 (Pampuch, column 1, line 57). As appreciated by those skilled in the art, an elastic band could be comprised of any combination of materials. For example, an elastic band may be constructed of 80% cotton interwoven with 20% materials having elastic properties. Pampuch describes neither material properties for the elastic band nor how it is constructed. Because elastic band 5 is not necessarily constructed solely of elastic materials, sealing elements comprised of elastofibers are not a

³ "laterally," Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 19 August 2010 <<http://www.merriam-webster.com/dictionary/laterally>>

⁴ "labyrinth," Houghton Mifflin. 2010. Yahoo Education. 23 August 2010 <<http://education.yahoo.com/reference/dictionary/entry/labyrinth>>

necessary part of the disclosure and the Examiner's inherency assertion is incorrect. *See In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (for an element to be inherently disclosed, it must be "necessarily present in the thing described in the reference").

Additionally, if the sealing elements of Pampuch are inherently comprised of elastofibers due to their relationship with elastic band 5, the basis for this assumption is that the sealing elements and elastic bands are of unitary construction and thus the sealing elements are necessarily elastic. If the sealing elements and elastic bands are of unitary construction then the sealing elements cannot be conjoined to the elastic band (see Discussion point I above). Stated differently, if the sealing elements are conjoined to elastic band 5 as asserted by the Examiner, then there is no basis for an inherency argument, as sealing elements conjoined to elastic band 5 are not necessarily comprised of elastofibers.

CONCLUSION

Although the preceding discussion was limited to independent claim 22, the arguments presented apply to independent claim 39 as claim 39 contains the same Examiner's rejections as discussed for claim 22. Claim 40 contains two of the three elements discussed above. Thus, claims 39 and 40 should be considered in allowable form based on the clear error of the Examiner's rejection. Additionally, because claims 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, and 38 depend from claim 22, Applicant respectfully submits that these claims are also in allowable form based on the clear error of examiner's rejection of claim 22.

It is respectfully requested that the basis for the Final Rejection of this application be reviewed based on the above discussion. If there are any questions or comments that would speed the prosecution, the Office is welcome to contact the undersigned by telephone to quickly resolve any issues. The Commissioner is authorized to charge any extensions of time as well as any additional fees or credit any overcharges to Deposit Account No. 23-3030.

Respectfully submitted,

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